BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHRYN ELIZABETH BARNETTE	)	
Claimant	)	
	)	
VS.	)	
	)	
PIZZA HUT	)	
Respondent	)	Docket No. 1,002,273
	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the May 21, 2003 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) found claimant did not suffer from an accidental injury as defined by the Kansas Workers Compensation Act (Act). Accordingly, preliminary benefits, in the form of temporary total disability benefits for the period November 5, 2001, and ongoing to a date undetermined in the record, were denied. Claimant appeals this determination and alleges work did, in fact, cause an "undesigned, sudden, and unexpected event" that gave rise to a change in the physical structure of her brain.[1] Respondent requests the Board affirm the ALJ's Order.

The sole issue for determination is whether claimant sustained an accidental injury that arose "out of" her employment with respondent.

[1] Claimant's Brief at 5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has a history of grand mal seizures dating back to a childhood illness. With medication, she has been able to keep the seizures to a minimum. According to claimant, the seizures would last about four or five seconds followed by a period of slight confusion. In 1995, her medication was adjusted and the seizures stopped. She continued to take the medication (Tegretol and Dilantin) during this time and was apparently able to hold down a 40-hour week job without any difficulty.

On October 31, 2001, claimant was a shift manager at respondent's Pizza Hut restaurant. On that date, the manager walked off the job leaving claimant to manage the store. According to claimant, she worked from 7:30 - 8 a.m. until closing the following morning at 1:30 - 3 a.m. She testified she was sleeping only about three hours per night. This situation continued until the third day, November 3, 2001. At the end of that work day, she went home and immediately fell asleep without taking her daily medications.

The next morning continued in the usual fashion until about 9 p.m. when claimant sat down and suffered a grand mal seizure. Claimant remembers nothing from that point forward until she woke up in the emergency room.

Since that time claimant has had difficulty speaking and walking, experiences agoraphobia and extreme panic attacks. In the two months immediately following November 4, 2001, she had 8-10 seizures. Her medication has been changed and she is now seizure free. Claimant has not returned to work for respondent nor any other employer. She is not undergoing any active treatment and the record contains no evidence that she is totally disabled from working.

The medical records submitted by the parties are sparse. There is some indication in a partial medical record that when claimant was taken to the emergency room her Dilantin level was "very low and she was loaded with IV Dilantin at that time."[2] That same exhibit states that claimant had skipped "a few" doses of both medications and has also had a weight gain.[3] It also refers to the seizures being "secondary to missed medication, fatigue, and an increase in weight, possibly also decreasing her drug levels."[4]

---

[2] P.H. Trans., Ex. 2 at 8.

[3] Id.

[4] Id.

Claimant's attorney arranged for an evaluation by Dr. Lynn Curtis on January 9, 2003. Dr. Curtis concluded that claimant should be evaluated by a neuropsychologist to determine the extent of her brain injury but that in the meantime, she should consider vocational job placement with the State of Kansas. Dr. Curtis went on to state that claimant could likely start work at a sedentary level, working part time 2-4 hours per day.

Claimant was also evaluated by Dr. Aileen Utley, a licensed psychologist, on March 28, and April 4, 2003. Following a battery of tests, Dr. Utley concluded claimant's presentation suggested an impairment that is consistent with some type of damage of the left hemisphere. Dr. Utley offered no opinion as to the cause of this damage.

The Act places the burden of proof upon claimant to establish his or her right to an award of compensation and to prove the conditions on which that right depends.[5] "Burden of proof" means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports the ALJ's findings. While the nature of the events of November 4, 2001, may arguably constitute an "accident" as that word is defined in the Act, K.S.A. 2001 Supp. 44-508(d), an accidental injury must, by statute, "arise out of and in the course of employment" in order to be compensable.[7] To arise "out of" employment requires some causal connection between the accidental injury and the employment.[8] *Bennett* dealt with an employee who suffered from an epileptic condition who was sent out on a delivery. On the trip back he experienced an epileptic seizure and hit a tree. In *Bennett*, the Court set out a general rule by stating:

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. (Citations omitted) But where an injury results from the concurrence of some preexisting idiopathic condition and some hazard of employment, compensation is allowed.[9]

---

[5] K.S.A. 44-501(a); *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P. 2d 871 (1984).

[6] K.S.A. 2001 Supp. 44-508(g).

[7] K.S.A. 44-501(a).

[8] *Bennett v. Wichita Fence Co.*, 16 Kan. App.2d 458, 824 P.2d 1001, (1992) *rev. denied* 250 Kan. 804 (1992).

[9] Id. at 460.

For this reason, the *Bennett* Court reasoned the increased risk of driving gave rise to compensability.

In this instance, claimant has suffered from seizures since 1965 when, at the age of 11, she contracted rheumatic and scarlet fever. This is a personal condition for which there is no compensation unless her employment provoked her seizure on November 4, 2001. As the evidence now stands, the inescapable conclusion is that claimant's failure to take her medication on the evening of November 4, 2001, more than likely led to the grand mal seizure. The fact that her extended work hours or weight gain may have played a part in the seizure is largely unexplored. Claimant has failed to meet her burden of proof on this issue. Therefore, the ALJ's Order is affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[10]

AWARD

WHEREFORE, the Order entered by ALJ Bryce D. Benedict on May 21, 2003, is hereby affirmed and benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of August 2003.

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
David F. Menghini, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] K.S.A. 44-534a(a)(2).